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## Criminal Law--Attempt to Receive Stolen Property--Fact That Property Was No Longer Stolen Held Immaterial

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other states will react to this spotlight on the gap in review procedure when there is no fair hearing below remains to be seen.

J. Mc K.

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CRIMINAL LAW--ATTEMPT TO RECEIVE STOLEN PROPERTY--FACT THAT PROPERTY WAS NO LONGER STOLEN HELD IMMATERIAL.—Six automobile tires were stolen but were recovered by the police. Upon being advised by one of the thieves that he was in the process of taking the tires to sell to a certain service station operator, the arresting officer suggested that he proceed with his plan and complete the sale. This was done and the service station operator was charged with an attempt to receive stolen property. In seeking a writ of prohibition, *D*, the service station operator, argued that the property was no longer stolen, since it had been recovered from the thieves, and therefore an essential element of the crime was missing. *Held*, even assuming that the character of the property had been changed from “stolen” to “recovered” (and that therefore prosecution for receiving stolen property would not lie), defendant had attempted to receive stolen property when he purchased the tires believing them to have been stolen and with an intent to keep them from the true owner. *Faustina v. Superior Court*, 345 P.2d 542 (Calif. 1959).

The problem of impossibility in the principal case is one small facet of the field of criminal attempts. An analysis of this facet, out of context, would be impractical—indeed, to take such an approach would be to succumb to the procedure which will be criticized in this comment. Rather, the analysis will cover the entire area of criminal attempts.

The courts have failed to recognize, and they have become victims of, the elusive irony of the law of attempts. They have divorced the attempt to commit a crime from the crime attempted and have joined all the myriad forms of attempt into a single body of substantive law, disregarding the dissimilarities among the individual attempts. Any law that deals with intent and the workings of the human mind without physical consummation is intrinsically subjective. In reducing all attempts to a unified body of law the courts have thus striven to catalogue elements of mental and moral manifestations that defy codification by our limited human methods. It follows that the most patently insignificant misdemeanors constitute the least comprehended and least satisfactorily resolved field of criminal law.

Inasmuch as a science is a systematic body of knowledge concerning a certain field, perhaps the denomination "social science" without more is misleading. The degree of precision and accuracy in any systematic body of knowledge is directly contingent upon the subject matter under consideration. And the "social sciences" have as the focal point of their explorations the most unpredictable element in the temporal order—free human acts. At the most, therefore, a social science especially must be qualified as a relatively systematic body of knowledge.

With this qualification in mind it may be said that jurisprudence ranks high, if not highest, in accuracy when compared with its social science brethren. But students of the law are well aware of the rather common misconception that the law closely parallels, sometimes equals, and on rare occasion even surpasses the precision of the natural sciences. That it strives for this precision can neither be denied nor declared anathema. Yet it should always be borne in mind that the nature of the subject for which the law was created and upon which the law operates necessarily dictates a high degree of mutability and relativity in its practical application.

The underpinning thesis of this discussion is that the field of criminal attempts has defied general elucidation because of the natural scientific inclination of the courts; that the attempted employment of natural scientific methodology has made categorization an end in itself, rather than a means to the end of clarity and facility in the use of the law; that this is one area of the law where it may be said that, without imperatives, a spade is still called an agricultural instrument.

That criminal attempts pose some of the most vexatious problems of the law does not admit of doubt. It is a rare discussion of the area that does not include some sort of apologia of which the following are illustrative:

It has been truly said by a philosophical writer that "the subject of criminal attempt, though it presses itself upon the attention wherever we walk through the fields of the criminal law, is very obscure in the books, and apparently not well understood either by the text-writers or the judges." And it may be added that it is more intricate and difficult of comprehension than any other branch of the criminal law. *Hicks v. Commonwealth*, 86 Va. 223, 226, 9 S.E. 1024, 1025 (1889).

And again:

This doctrine of attempt to commit a substantive crime is one of the most important, and at the same time most intricate, titles

of the criminal law. . . . there is no title, indeed, less understood by the courts, or more obscure in the text books than that of attempts. *Cunningham v. State*, 49 Miss. 685, 701 (1874).

No small number of scholars have searched for the rationale of the confusion, but very few have come up with satisfactory explanations. More common has been a cure at least as unintelligible as the illness. For a recent example see Smith, *Two Problems In Criminal Attempts*, 70 Harv. L. Rev. 422 (1957). Although it is usually dangerous to deal in superlatives, the writer feels that the most incisive analysis of this problem was made some thirty years ago. See Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53 (1930). It would be the height of academic pretention to deny reliance upon the ideas of such a distinguished legal mind.

Legal problems are often spoken of as confused under two different sets of circumstances: a. where courts have done inconsistent things with similar fact situations and, b. where courts have tried to make the same rule cover utterly incongruous situations. It is in the latter area that our problem is found. A few examples will suffice.

In *Hicks v. Commonwealth*, *supra*, D had purchased poison, delivered it to a third party, and asked that party to place the poison in the coffee of the intended victim. The court, in discussing the charge of attempting to poison with intent to kill, thought it meet to compare the case with *People v. Murray*, 14 Cal. 159 (1859). The latter case involved an indictment for attempting to contract an incestuous marriage where the defendant had eloped with his niece and sent for a magistrate to perform the ceremony. The conviction for the attempted incestuous marriage was reversed on the theory that the defendant had not gone beyond acts of preparation.

Indeed, the *Murray* case has been used so frequently that at first blush it appears to be a panacea for almost all problems of criminal attempt. Thus it was used: to absolve a defendant indicted for unlawful attempt to manufacture liquors where defendant had collected barrels and other paraphernalia; in a suit on an accident insurance policy where it was held that hunting prairie chickens with a loaded gun is not attempting to kill them; to save a defendant from conviction for an assault with a sharp and dangerous weapon; in cases involving murder in connection with attempted burglary, conspiracy to obtain money by false pretenses, lewd acts, pandering,

attempts to assist in an escape from jail—the list could apparently go on ad infinitum.

In *Cunningham v. State*, *supra*, the defendant had given X money, unlawfully to induce a witness to absent himself from court. To resolve the problem, raised by the indictment for attempting to obstruct and impede the administration of justice, the court referred to: a. the evidence in a case where D offered money to another person to set fire to a barn and furnished him matches; b. indictments for the possession of forged bank bills; c. a case involving the form of an indictment for an attempt at larceny, and d. cases where a request to commit adultery was held not to be indictable. These analytical patterns have been followed in case after case involving criminal attempts.

The scholars and judges tell us that this method is used in order to find the attributes by which an attempt per se may be recognized. This operates on the spurious and fatal assumption that it is desirable to consider attempts without regard to the particular crime attempted. Traces of this assumption are found in the late 18th century, *Rex v. Scofield*, Cald. 397 (1784), but the early 19th century case of *Rex v. Higgins*, 2 East 5 (1801) gave it definite shape. Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821 (1928).

Earlier cases in the field justified conviction for an attempted crime by the doctrine, *voluntas reputatur pro facto*, or, the intention is to be taken for the deed. 2 STEPHEN, HISTORY OF CRIMINAL LAW OF ENGLAND 222 (1883). Of course, this was not punishment for mere intent alone, away from which the positive law properly moved, feeling that the fixing of guilt through evil intent alone was the province of the omniscient Judge perfectly administering the moral order. The application of the doctrine was simply a recognition of the power of the courts to extend the policy of a given rule prohibiting a crime to certain acts which had failed to achieve the prohibited result. Such an application necessitated a consideration of the criminality of an attempt in light of the particular crime attempted. Had this approach been continued, "An examination of the rule prohibiting the substantive crime would have been our only guide in determining how far conduct which failed of that result should be punished." Arnold, *supra*, at 59.

But 19th century jurisprudence refused to let well enough alone. It was appalling that the courts should be able to extend the limits of substantive crimes through the exercise of a certain limited discretionary power. Surely a greater degree of precision could be

achieved by making attempt itself a substantive crime. Once this course was adopted, it became necessary to search for the limits and elements of such substantive crime and the dichotomy was complete—the substantive crime of attempt was to have its own earmarks without reference to the crime attempted.

Thus grew up a large body of legal niceties concerning the limits within which crimes might be attempted and the elements of such attempt. Divergent theories emanated from such general rules as the following: any attempt to commit any crime is a substantive offense amounting to a common law misdemeanor. Beale, *Criminal Attempts*, 16 HARV. L. REV. 491 (1903). Then, distinctions followed: a. if the offense was a misdemeanor which was “malum prohibitum,” “purely statutory,” or “not malicious,” an attempt to commit it would not be criminal; b. there could be no attempt to commit an attempt; c. some acts were criminal because of their consequences and others because of their surrounding circumstances—an act being defined as a willed muscular contraction; d. the distinctions were made between direct and relative attempts; between assault and attempt; and between solicitation and attempt.

Elements of an attempt were usually: a. the specific intent to commit the crime with its concomitants of subjective and objective intent, intent inferred from conduct, and intent inferred from the presumption that a man intends the reasonable and probable consequences of his acts; b. the performance of an act toward the accomplishment of the crime, wherein the means used must be reasonably adapted to the end, and which act must go beyond mere preparation; c. the failure to complete the crime intended which leads to the obvious problem of determining just what exactly does amount to sufficient failure for criminality to attach.

The core and the ramifications of the problem are thus clearly identified—the consideration of attempt as a substantive crime apart from the particular crime attempted and the resultant application of general rules to completely dissimilar situations, which application is inherent in the method of analysis.

To speak of the law of criminal attempts as a classified set of rules describing the elements of any crime or covering any given conduct is to perpetuate the aimless wanderings of the courts. Why not speak of this law as a discretionary power of the courts, given by the legislature or common law precedent, “. . . to extend the limits of prohibitions against certain kinds of conduct to conduct which does not quite fall within the terms of those prohibitions.”?

Arnold, *supra*, at 74. Mr. Arnold states that this power is analogous to the power which courts have possessed in the field known as common law crimes.

The law of common law crimes is regarded as a tool with which courts are free to fill up omissions in criminal codes. "The law of criminal attempts is exactly the same kind of a thing. . . . it simply means that courts are permitted to fill in the gaps which a set of definitions inevitably leave when applied to human conduct. . . . To treat this power as the definition of a substantive crime is either to destroy it or hopelessly to confuse it." Arnold, *supra*, at 75.

And what of our original concept of scientific precision? To speak of precision in an area where judicial discretion is the governing force is futile. But strivings for scientific precision in the law of criminal attempts have produced results which are the diametric opposite of the accuracy desired. To try the rule of judicial discretion could certainly produce nothing worse and there is a good chance for something a great deal better.

E. P. K.

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CRIMINAL LAW—FORGERY—USE OF FICTITIOUS OR ASSUMED NAME.—Having established himself as one "R. E. Spaine," a fictitious person, *D* gave a check payable to the G Hotel, drawn on the X Co., and signed "R. E. Spaine," to the hotel manager. The check was to pay his bill at the hotel where he had registered twice within a month under the fictitious name; he received the balance in cash. *D* had no account in the X Co. The check was transported in interstate commerce. *D* was convicted for violation of a federal statute making it a crime to cause a falsely made and forged security to be transported in interstate commerce, knowing the instrument to have been falsely made and forged. 18 U.S.C. § 2314 (Supp. 1958). *Held*, sustaining the conviction, where *D* assumes a name and in addition uses that name to create a fictional person with real characteristics, personality and identity, the use of that name as an instrument of fraud is as much a forgery as though the fictional person were real. *Edge v. United States*, 270 F.2d 837 (5th Cir. 1959).

Two views of forgery have been expounded by the federal courts in an effort to establish the law on this subject. Under the "broad" view, if an instrument is sufficiently valid on its face to